

INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

July 30, 2008

Third Party Communication: None
Date of Communication: Not Applicable

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Index (UIL) No.: 2041.02-00
CASE-MIS No.: TAM-120910-08

SBSE Estate and Gift Tax

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No
Date of Death:
Date of Conference:

LEGEND

Decedent =
Husband =
Trust =

Date 1 =
Date 2 =
State =
Statute =

ISSUE

Whether Decedent possessed at death a general power of appointment within the meaning of § 2041 of the Internal Revenue Code over property held in Trust.

CONCLUSION

Decedent did not possess at death a general power of appointment within the meaning of § 2041.

FACTS

Decedent was married to Husband who died on Date 1. Date 1 is after October 21, 1942. Article VI of Husband's Will provided that the residue of Husband's estate was to be held in trust, Trust. Article VI, paragraph (a) of Husband's Will provides:

My wife, [Decedent], shall be entitled to receive and the Trustee shall pay to her for so long as she shall live, so much of the net income as the Trustee in its sole discretion reasonably exercised, taking into account other income and resources she may have, deems necessary and appropriate to provide for the health, support and maintenance of my wife, [Decedent], in the manner to which she is accustomed at the time of my death. Income which is not distributed shall be accumulated and added to principal at least annually.

Article VI, paragraph (b) provides:

If the Trustee in its sole discretion determines that the net income of said Trust is not sufficient to maintain and support my wife, [Decedent], in the station in life to which she is accustomed, taking into consideration all other sources of income which she may have, the Trustee may, in its sole discretion, use so much of the principal of said Trust as it deems necessary to make up such deficiency.

Article VI, paragraph (c) provides that, upon the death of Decedent, the residue of Husband's estate and the corpus and accumulated income, if any, of the trusts created in Husband's Will are to be divided into two trusts, one for Husband's nephew and nieces and their descendants, and the other for Decedent's nephews and their descendants.

Article VI, paragraph (d) provides:

Regardless of any other provision of this instrument, no beneficiary of any trust created hereby shall ever have or acquire the right to anticipate, encumber or assign, or in any other manner alienate his or her interest in the trust property or the income therefrom. Nor shall the same ever be or become subject to execution, attachment, garnishment or any other judicial, quasi-judicial or administrative process whatever for the purpose of enforcing any claim, demand

or judgment, including alimony, against such beneficiary. Whenever and as often as the Trustee deems it appropriate so to do, in order to carry out the spirit and purpose of this provision, payment to any beneficiary named herein may be discontinued, and in lieu thereof, the Trustee may expend for the account of such beneficiary and for his or her support, comfort, happiness and welfare, such amounts as would otherwise be paid over directly to such beneficiary.

Decedent died on Date 2. At the time of her death, Decedent was the Trustee of Trust and a resident of State.

LAW AND ANALYSIS

Section 2041(a)(2) provides that the value of a decedent's gross estate shall be determined by including the value at the time of death of all property to the extent of any property with respect to which the decedent has at the time of death a general power of appointment created after October 21, 1942.

Section 2041(b)(1) defines the term "general power of appointment" as a power which is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate. However, § 2041(b)(1)(a) provides that a power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

Section 20.2041-1(c)(2) of the Estate Tax Regulations provides that a power to use the trust property for the comfort, welfare, or happiness of the decedent is not a power limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent. However, a power exercisable to support the holder in the holder's accustomed manner of living is a power limited by the requisite standard.

Section 20.2041-3(b) provides that, for purposes of § 2041(a)(2), a power of appointment is considered to exist on the date of a decedent's death even though the exercise of the power is subject to the precedent giving of notice, or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the decedent's death notice has been given or the power has been exercised. However, a power which by its terms is exercisable only upon the occurrence during the decedent's lifetime of an event or a contingency which did not in fact take place or occur during such time is not a power in existence on the date of the decedent's death. For example, if a decedent was given a general power of appointment exercisable only after he reached a certain age, only if he survived another person, or only if he died without descendants, the power would not be in existence on the date of the decedent's death if the condition precedent to its exercise had not occurred.

Rev. Rul. 78-398, 1978-2 C.B. 237, provides that the taxability of property under § 2041(a) is determined by the nature and scope of the power to which the property is subject. The manner in which the power is acquired is not material. Thus, a beneficiary of a trust who is also a trust fiduciary may possess a power exercisable in a fiduciary capacity that constitutes a general power of appointment if the nature and scope of the power is not sufficiently limited. Estate of Lanigan v. Commissioner, 45 T.C. 247 (1965). However, a power of appointment that is measurable in terms of a beneficiary's needs for health, education, support, or maintenance is not regarded as a general power of appointment even though the power is possessed by the beneficiary as a trustee of the property subject to the power.

In the present situation, Decedent's power as trustee under Article VI, paragraph (a) to distribute trust income to herself was limited to those amounts necessary to provide for Decedent's health, support and maintenance. Similarly, Decedent's power as trustee under Article VI, paragraph (b) to distribute trust corpus is limited to amounts necessary to "maintain and support" the Decedent in her accustomed station in life. Since the powers granted under Article VI, paragraphs (a) and (b) are restricted in such a manner as to satisfy the criteria of § 2041(b)(1)(A), neither power is a general power of appointment. Compare, Rev. Rul. 77-60, 1977-1 C.B. 282.

In addition, we do not believe the power granted under the last sentence of Article VI, paragraph (d), constitutes a general power of appointment that Decedent possessed at her death. The first two sentences of this paragraph restrict the power of any beneficiary of any trust created under the will to assign or alienate his or her interest under a trust, nor can any such interest become subject to attachment, etc. These restrictions establish Trust as a spendthrift trust, and the restrictions are generally recognized as effective under State law. Statute.

The last sentence of the paragraph grants the trustee the power to discontinue any payments due under the terms of a trust and in lieu of those payments expend funds "on account of such beneficiary" for, inter alia, the beneficiary's comfort and happiness. However, this power to discontinue payments and distribute trust property based on the broader standard of comfort and happiness, is exercisable by the trustee "in order to carry out the spirit and purpose of this provision", that is the spendthrift provision contained in the first part of the paragraph. Thus, we believe this broad distributive power becomes exercisable, only if the beneficiary triggers the spendthrift provision, for example, by attempting to assign the trust interest or if a third party attempts to garnish or execute against the trust interest, or the beneficiary otherwise becomes financially distressed in some manner. There is no indication that, at the time of Decedent's death, she met any criteria that would trigger the spendthrift provision and the ability to exercise the power. Thus, at the time of her death, Decedent's exercise of the Article VI, paragraph (d) power was conditioned on the occurrence of events or contingencies that were not in existence on the date of Decedent's death. In accordance with § 20.2041-3(b), a power, which by its terms is exercisable only upon

the occurrence during the Decedent's lifetime of an event which did not in fact take place is not a power in existence at Decedent's death. Accordingly, Decedent did not possess at death a general power of appointment within the meaning of § 2041 over property held in Trust.

CAVEAT:

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.